UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL BASKETBALL ASSOCIATION,

Plaintiff,

v. 04 Civ. 9528 (GBD)

NATIONAL BASKET BALL PLAYERS ASSOCIATION, RON ARTEST, STEPHEN JACKSON, ANTHONY JOHNSON, and JERMAINE O'NEAL,

Defendants.

TRO

New York, N.Y.
December 23, 2004
10:00 a.m.

Before:

HON. GEORGE B. DANIELS

District Judge

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(Case called)

THE COURT: Good morning, gentlemen. I guess I should hear you first, Mr. Kessler, with regard to this application. It is an application for a temporary restraining order and/or

preliminary injunction. I would like to get a feel from you exactly what you say the status of this case is and what you say is the appropriate relief at this stage of the proceeding.

MR. KESSLER: Very good, your Honor.

THE COURT: If you would use the podium, it might be easier for the court reporter.

MR. KESSLER: Today, your Honor, we filed an answer and counterclaim in this case asking that the arbitration award issued yesterday by Roger Kaplan in this matter be confirmed and seeking preliminary and permanent injunctive relief not only to confirm but to require the NBA to comply with that arbitration award, because the NBA has made it very clear that they will not so comply absent a court order.

We believe, your Honor, it is appropriate and compelling that in these very special circumstances a temporary restraining order be issued immediately by the Court today to allow Mr. O'Neal, who is the one player immediately affected, to begin playing games in the NBA as the arbitrator has so ordered in reducing his suspension.

The reason we believe that type of extraordinary relief is required is because this is a classic case, your

Honor, where all the circumstances for a temporary restraining order are present. First of all, your Honor, to address the requirement of irreparable harm, there can be no question, and the case law is very clear on this, that when you take a professional athlete of Mr. O'Neal's caliber and you require him to miss games, that is not something he can be compensated for by saying we will give you your back pay or we will give you your monetary damages at some later time.

Mr. O'Neal, and this in the arbitration decision is

not disputed, is one of the top players in the NBA. His absence has an immediate and continuing effect on his team, who may not make the playoffs this year despite the fact that they were one of the favorite teams this year. Losing that type of an opportunity or having a lower seed in the playoffs, any of those losses are not compensable in the short career of an NBA player.

This could be Mr. O'Neal's last year of playing. You have no way of knowing with a professional athlete. Making the playoffs or not could be something you could never give back to him or his fans. So we believe the injury is clearly irreparable from the standpoint of Mr. O'Neal.

THE COURT: Let me ask you a question. The NBA argues that, first of all, it can be compensated in dollars, that this is basically an argument that could be made any time a player is suspended, and in fact this is something that has been

contemplated by both parties and is specifically addressed in the contract and the agreement, that it has always been contemplated, and there has never been a situation where the Players Association has either won an argument or even argued that a player should not immediately be suspended pending a final decision on that suspension or final appeal of that suspension because the player cannot be compensated in dollars.

MR. KESSLER: There is a critical distinction, your Honor. This is an unprecedented situation. In the history of the National Basketball Association collective bargaining, and I believe there have been collective bargaining agreements going back to sometime in the late 1960s, there has never been a single time in which the NBA and its teams have ever refused to comply with an arbitration decision, period. The issue has never come up.

We are in a vastly different situation, vastly different, because of the enormously strong federal policy in favor of arbitration, enormously different situation, where an arbitrator has ruled, gone through the process, the arbitrator which both parties have selected has ruled, has decided this, and the NBA is simply saying we won't comply.

THE COURT: That doesn't change the irreparable harm and doesn't change whether or not a person could be compensated in dollars for that.

MR. KESSLER: I will get to the irreparable harm. I was responding to the point that it has never happened before, that an injunction has been granted pending a suspension. On likelihood of success --

THE COURT: I wasn't addressing likelihood of success. My question only went to irreparable injury.

MR. KESSLER: On irreparable harm directly -- and I will come back to the other issue -- we have cited case after case, including the Silverman case in the Second Circuit, that establishes that professional athletes are special in terms of what it means to them to miss games. There is huge competitive significance.

If Mr. O'Neal gets one dollar more of salary one day or not, that is not the injury that he suffers. It is nice that he gets his salary, I am not begrudging it. But the injury he suffers is the fact that if his team doesn't make the playoffs by one game, he never gets back that year. If his team makes the playoffs but makes it at a lower seed so they end up losing because they don't have home court advantage, he never gets back that opportunity again.

That type of irreparable harm has been recognized in

case after case where leagues have said we are not going to allow a player to play, we are not going to do this, over and over again. In fact, I am not aware of any case in the country where the irreparable harm has even been questioned in a case where we have likelihood of success.

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The reason I mention that is the only reason why parties have not sought stays of suspensions pending arbitrations in the NBA, which is what they are arguing, has all to do with the likelihood of success. In other words, you have no idea. Until the arbitrator rules, it is very hard to say you have a likelihood of success. So nobody has ever gone into court saying it is so likely the arbitrator is going to rule in their favor that you should stay the suspension.

That is a very different situation, on the likelihood, than respect to the irreparable harm issue, where the judicial precedents are clear.

Your Honor, look at the flip side of this. I think this is very important on looking at this analysis in terms of the balance of harms. From the NBA standpoint, if we are wrong and you issue a TRO and next week you decide in a preliminary injunction hearing or later on that Mr. O'Neal should have served, he can be suspended and serve the games then.

In other words, there is no harm to the NBA. There is no magic from their standpoint whether he misses a game this weekend or whether he misses a game a month from now in the season if that were to be reversed. There is zero harm to them. There is enormous irreparable harm to him.

Again, looking at the policy in the Federal Arbitration Act, in the National Labor Relations Act with respect to the importance of arbitration, what we bargained for

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here was expedited resolution in arbitration. That is the provision of the CBA that was invoked.

From a union standpoint, if any time a party wants to defeat that expedition they can simply say, well, I'm contesting jurisdiction and therefore you don't have irreparable harm, just wait, knowing we can never get that back, then you defeat the purpose.

This is only going to come up once in a blue moon. We have a lot of stars aligned here on this Christmas Eve that we are approaching. The situation here, again, is the first time that I am aware of in the history of the NBA where they refused to follow an arbitration decision where the decision has an immediate effect, because the suspension just ended last night according to the arbitrator, where the arbitrator has said "forthwith."

There is a reason why the arbitrator said "forthwith," and that is because he understood the urgency of getting those games back to the players in order to play, and the fact that there is absolutely no harm to them if we are wrong. There is no harm to them at all.

They say they are harmed in the brief, which I read very quickly, because I just got it, by the fact that the commissioner's institutional authority is undermined. Well, if ultimately you decide the arbitrator was wrong, he will get back his institutional authority. That is not irreparable

injury.

The only issue we are talking about for this TRO is whether O'Neal plays or he doesn't play between now and when we decide this issue.

The other thing I mention here, and this is very

important because of the arbitration, the Second Circuit has made it clear that when you are moving to confirm an arbitration award, which is what effect the underlying relief is here, what is contemplated here, what is contemplated, is summary proceedings by the court. In other words, when parties try to come in, and I am reading now from the Pickholz case in the Second Circuit, it says, "The confirmation of arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court."

The whole point here is speed, is resolution. Frankly, in any other case I have done I never have this much authority: A number of Supreme Court/Second Circuit cases that talk about the deference to arbitration, the need to allow that process to get what the parties bargained for, the importance of not depriving the parties of that process, for judges to facilitate the process going forward. That is what all these cases are about.

It is not about long judicial proceedings or delays or putting things off, which is what they are asking for relief for, where at the end of the day all Mr. O'Neal can get back is

money. The Players Association gets back nothing. They have lost their expedition for their players. The fans, if they should have played, get back nothing, and the team gets back nothing. All that irreparable harm happens.

On the other hand, if you grant the injunction -- and you have to show likelihood of success, we will get to that -- but assuming we are going to convince you we have shown not only substantial questions but likelihood of success, in that case the need for temporary relief is compelling, I would submit, in this particular case in terms of that.

THE COURT: Isn't it somewhat of a concession by the

Players Association that this can be compensated in dollars because that is exactly what the Players Association agreed to in the collective bargaining agreement?

MR. KESSLER: No.

THE COURT: Isn't that what the collective bargaining agreement says? It says that during the period of time the suspension should go forward, and if it is determined that the suspension should not have gone forward, then the player should be compensated in dollars. Isn't that specifically addressed almost word for word that way in the collective bargaining agreement?

MR. KESSLER: Not exactly that way, your Honor. I will explain what that is.

THE COURT: I have the language here, if I can find it

in the pages I have read.

MR. MISHKIN: Your Honor, it is paragraph 14(d) of Article XXXI of the collective bargaining agreement, page 223 of the CBA.

THE COURT: I think you have cited it either in Mr. Buchanan's affidavit or in your brief.

MR. KESSLER: Yes. Let me explain.

THE COURT: Do you remember where that was?

MR. MISHKIN: Yes. Page 24, your Honor, of Mr. Buchanan's affidavit.

THE COURT: All right. The language says, "Nothing contained herein shall excuse a player from prompt compliance with any discipline imposed upon him. If discipline imposed upon a player is determined to be improper by final disposition under this Article XXXI, the player shall promptly be made whole." I believe there is further language indicating that

the player should receive compensation for that period of time.

That is at least some evidence that the Players Association agreed that, in the usual circumstances rather than the unusual circumstance. there isn't a general argument that a player cannot be compensated monetarily.

MR. KESSLER: With all due respect, your Honor, I think what this indicates is the following. It has nothing to do with whether the harm is irreparable or not. It simply has to do with the fact that prior to the issue being resolved by

the arbitrator, which is what this refers to, prior to it being resolved, in that case they are saying the player cannot, prior to it being resolved, refuse to comply. He has to comply with the suspension while it is being appealed. And if he wins, obviously, since he has complied, he will be made whole in some way.

THE COURT: How do you make him whole?

MR. KESSLER: Let me explain how that works. Let's say there is a 20-game suspension and there is an appeal and it is decided at the 10th game to overturn the appeal and reduce it. Let's say it is undisputed, there is no dispute over jurisdiction and that is decided. Sprewell, for example, was overturned by the grievance arbitrator to reduce it.

The moment that he would be eligible to play at that time, he gets to play. And if there were prior games which he should not have been suspended for, he would get back the pay. That is what it means.

But that doesn't mean he didn't suffer irreparable harm earlier. That is my only point. That is simply a bargained-for agreement for what happens prior to the ruling by the arbitrator.

Look at what the last sentence says. It says, "If

discipline imposed upon a player is determined to be improper by a final disposition under this Article XXXI" -- that is what happened here, that is what happened here, we have a final

disposition under Article XXXI -- "the player shall promptly," not at some future time, promptly, "be made whole."

The way to make this player whole now, it doesn't say through monetary damages, it doesn't say the player shall be given money, it doesn't say you do the best you can in the circumstances at that point. But once you get this final disposition -- this language actually supports us -- once you get this disposition which we have from the arbitrator, that is why it is different, then what the CBA says is the player shall be made promptly whole. It doesn't say give him money. You do what you can at that point.

If the suspension is reduced -- and there have been times that Commissioner Stern, when he has been the arbitrator, has reduced the suspension -- he doesn't just give the player money and say the suspension takes effect. What he does then is he lets the player immediately play the future games and he gives him money if he can't do anything else at that point.

But that is not a concession or agreement that they haven't suffered irreparable injury, which is the issue now before you for which the Linsman case, the Silverman case, the Jackson case, the O'Neal case, the various cases we cited --

THE COURT: All the cases you cite are cases where there was a final determination of those issues.

MR. KESSLER: No, sir.

THE COURT: There is still a dispute. All of those

cases, by the time that the final decision was made to either

enforce the suspension or change the suspension, both sides were in a position to accept the final determination that had been made. There were no further reviews that were to be made in any of those cases.

MR. KESSLER: Actually, your Honor, that is not correct. The cases that I am citing now in the irreparable injury section of our brief are cases that had nothing to do with suspensions by discipline or final review. Those are cases where a league was not letting a player play for some reason.

For example, in the Jackson case they were not letting the people play in the NFL because of some rules regarding free agency. In the O'Neal case it was because he was a one-eyed hockey player. In the Silverman case it was because there was a lockout going on. None of those had final rulings.

Each of those cases were cases on preliminary injunction or TRO requests, just like here, where the party came in and simply said there is a likelihood of success on the merits and the court said since there is a likelihood of success ultimately that they should allow you to play, we turn to the irreparable harm factor and on the irreparable harm factor we find a player's career is incredibly short and precarious and therefore losing any games cannot be made whole in monetary damages. That is what every single case that we

have cited says, and there is no case to the contrary.

THE COURT: You just excluded all of the cases of discipline, and that is what this case is, a case of discipline. My understanding of every single one of those cases of discipline that you are referring to is that the time that the decision was made to make the player whole was a time when there was a final disposition, there was no further

dispute, all appeals having been exhausted. All court cases, if there were any, had been exhausted, and both sides had agreed that was going to be a final decision and that was it. That is not the status that we have here.

MR. KESSLER: Your Honor, again, in all due respect --

THE COURT: The discipline cases.

MR. KESSLER: I am talking now about a discipline case. We don't have a precedent the case where the NBA has refused to comply, so I don't have a case going to court. But what I can say is the language of the CBA is unequivocal in 14(c) that when there is a final disposition under this Article XXXI, which is defined as grievance arbitration, final disposition is defined in section 1.

I will read to you from section 5 of Article XXXI. This is saying the award, the arbitrator's award, "shall constitute full, final, and complete disposition of the grievance and shall be binding upon the players, the teams involved, and the parties to this agreement."

Once we get that award in section 5, which is full, final, and dispositive, and we get to the language in 14(d), which they cited you to, which says when you get the final disposition you shall promptly be made whole, you put those two together, that is what we have.

Now, it is true here that they dispute the jurisdiction of the arbitrator. That is the likelihood of success argument.

THE COURT: That is what I was going to ask you about. This is an unusual circumstance, that is the way I will characterize it, to talk about a full, final, and dispositive decision when the NBA doesn't acknowledge the jurisdiction of

the arbitrator, didn't participate in the arbitration, and now there is still a question being raised by them as to whether or not the arbitrator had jurisdiction to decide this case and whether it was properly decided.

MR. KESSLER: While it is unusual in the NBA, it is not unusual for the federal courts to deal with this issue or even arbitrations to deal with this issue. In fact, the American Arbitration Association rules, which the arbitrator noted are what applies by the terms of the agreement, specifically provide for cases where one party refused to show up in the arbitration. This happens from time to time, and it directs the arbitrator to complete the arbitration, take the evidence, do justice.

In other words, what the federal courts say here, and this is all the Supreme Court authority, which is over and over again the Second Circuit, if there is an agreement to arbitrate, the presumption in favor of that, the deference to that, is enormous. It is one of the strongest doctrines in the federal jurisprudence.

The Federal Arbitration Act has mandatory terms for the court. If something is supposed to be in arbitration, the court has no discretion, it must go to arbitration. If something could even possibly be subject to arbitration, the cases say it must go there.

If this were not true, this would gut that federal policy. Put it aside from the NBA, because this is really not an NBA issue. If someone has an agreement to arbitrate that says full, final, binding arbitration, and they say, I don't like it, there is no jurisdiction, I won't comply, that's all right unless --

They can contest that. There are ways to do it. They

can make a motion to set aside the arbitration. They could oppose confirmation.

-- except where there is a likelihood of success on the merits that there is jurisdiction or there are substantial questions going to that issue and the balance of hardships tip decidedly in favor of the movants. In other words, you are now back to your normal application of TRO standards.

Courts are wrestling with this. What I urge your Honor is don't think of this as a sports case. Think of this as a case --

THE COURT: This was a collective bargaining case.

MR. KESSLER: That's correct.

THE COURT: This is not a sports case.

MR. KESSLER: That's correct. For unions in arbitrations, when we look at it this way, outside of the context, it is very, very clear this was done. Let's say this was a steel workers case and let's say a steel worker was suspended and his family couldn't pay their mortgage because he wasn't getting paid, and the full, final, binding decision of the arbitrator was he should be immediately reinstated and he had irreparable harm, your Honor, because he was to lose his house if he didn't get that done.

Your Honor would find that is a different reason for irreparable harm. He is not a player. He doesn't care about winning or losing championships. He would have irreparable harm if you found the likelihood of jurisdiction, so that was full and final, what you would do is you would say he has irreparable harm, there is a likelihood of success on the merits that they were going to be able to confirm this award, there is a balance of hardships in his favor because there is

no real harm to the employer -- if it is wrong they always can lay him off again later -- and then you would grant a temporary

restraining order.

You have to look at it in the context of an ordinary union here, particularly where it is a labor CBA, because the Supreme Court cases talk about labor CBAs, because of the National Labor Relations Act, are particularly favored with respect to this process.

I need now to turn to likelihood of success, obviously. But if I convince you, and think I will, that there is a likelihood of success that we are going to be able to confirm this award for jurisdiction, let alone substantial questions -- which would also be enough under the TRO standards in this circuit if the balance of hardships tips in our favor, and I think it decisively does, decisively does.

By the way, interestingly on these grounds, the NBA cites the decision in the Ewing transcript, which was a denial of TRO. I commend your Honor to read the portion of that decision on irreparable harm. There Judge Rakoff found unequivocally we satisfied the irreparable harm test if those Knicks had missed just that one game. He found unequivocally on the irreparable harm for that one game. We won that part of it.

What we lost on was on likelihood of success and substantial questions going to the merits, which I think is very, very different here from what we had there. And I will talk about that case. But I commend you to read Judge Rakoff

on the irreparable harm because he was correct that it would be irreparable harm for a player to lose that, and this is exactly the same situation with respect to that issue.

THE COURT: As you move into your position with regard to likelihood success, let me first have a discussion to set the parameters of what needs to be decided today.

MR. KESSLER: Yes, your Honor.

THE COURT: Starting out, it seems to me what today's application is not about. It seems to me that it is not about the discipline of suspensions that were meted out by the commissioner with regard to Mr. Artest, Mr. Johnson, and Mr. Jackson.

MR. KESSLER: Correct.

THE COURT: However they want to characterize it and you want to characterize it, the arbitrator agreed that that was an appropriate discipline and that there was just cause for that discipline.

MR. KESSLER: And we are not challenging that aspect of the award.

THE COURT: So I don't need to hear argument about whether or not at this point it needs to be confirmed or not confirmed. That can be resolved another day, if it is even not moot at this point with regard to whether or not a court needs to make a determination on that.

MR. KESSLER: We could probably agree to that by

stipulation on the other players.

THE COURT: At this point I need to hear from you what you say the likelihood of success on the merits is and what it is that you say the arbitrator found and concluded and why the arbitrator concluded that way with regard to Mr. O'Neal. That is where I want to focus, because that is the important issue to be resolved.

MR. KESSLER: I agree, your Honor. I am just going to

make your job half as difficult on this issue. The only issue you need to decide on likelihood of success with regard to just Mr. O'Neal is whether we are likely to show the arbitrator had jurisdiction.

It is very well established, and the NBA's papers don't challenge this. They are not trying to reargue the merits of the suspension. Federal courts do not do that. They are not arguing that the arbitrator was corrupt or some other very narrow ground for overturning the arbitration. They have one argument. Their one argument, which is the basis of their complaint and it is the basis of their defense, is that it was not within his jurisdiction.

So the only issue we have to address now is jurisdiction. If there is a likelihood he had jurisdiction, we are done on likelihood of success. In other words, it is not your role, and this is what the parties bargained for, to decide whether the discipline was fair or unfair or just cause

or unjust cause. That is all behind us in terms of the arbitrator. The arbitrator either had the jurisdiction or he didn't. If he did, it is over. That is the issue I am going to focus on.

THE COURT: Do you think the issue is any broader than whether or not the issue of jurisdiction is determined by section 8 of I believe Article XXXI, which says that the commissioner has the authority to impose on-the-court discipline and has the sole authority to do that? Do you agree or disagree that the issue here is whether or not the activity of Mr. O'Neal falls within that section as being defined as on-the-court activity or falls outside that section?

MR. KESSLER: I think that is one of the two issues that are very relevant here.

THE COURT: What do you say is the second?

MR. KESSLER: There are two bases, two bases, on which Arbitrator Kaplan found jurisdiction here, two bases.

I want to say something first about your standard of reviewing what he did so that we have that as well. The Supreme Court in a series of recent cases -- and the cases specifically, your Honor, which we cite are the Housan case, which is a 2002 Supreme Court case; Greentree Financial Corp., which is a 2003 Supreme Court case and citing back to John Wiley & Sons, which is an older Supreme Court case -- has made it clear that there is a difference between substantive

arbitrability and procedural arbitrability. That I think is very, very important to your review standard. That is what this goes to, which is the following.

Substantive arbitrability, as made clear in these cases, is whether there is an agreement to arbitrate that subject matter at all or whether it belongs in the courts. In other words, if the NBA came in and said to you, I think Mr. O'Neal and the union should have filed a court action to challenge directly the discipline on the merits because there is no agreement to arbitrate that, that would be an issue of substantive arbitrability, whether there is an agreement to arbitrate over the subject at all. That is de novo review. So when you would be looking at likelihood of success, you would be looking at it there through a de novo framework. That is one possibility.

The other possibility, as the Supreme Court noted, is procedural arbitrability. Procedural arbitrability is that both parties agree the issue doesn't belong in the courts, the issue should be decided by some arbitrator if it is going to be

decided. There are conditions to that arbitration. In other words, it has to be perhaps above a certain amount of money.

For example, one of the things we are going to talk about here is that we have to have $25,000 in injury in order to get a grievance arbitrator as opposed to the commissioner. That is a classic procedural arbitration issue. Is it above

$25,000 or not? It can be arbitrated, but the question is, is it $25,000? That is a condition precedent to the arbitration that is procedural.

Which arbitrator should it be? Should it be Commissioner Stern or should it be the grievance arbitrator? This is very important. Your Honor characterized section 8 of Article XXXI as saying that Commissioner Stern has sole authority in this area. That is not what it says. That is what the NBA says it says.

The NBA says a lot of things, and Mr. Mishkin will say a lot of things and their briefs say a lot of things. I urge you please looking carefully at the words of the CBA, because it ain't what they say it says. That is the point here.

The CBA says in Article XXXI -- and the entire section is called "Grievance and Arbitration Procedure," the entire section -- it says that any dispute involving --

First of all, let's look at section 5(c) before we get to section 8. It says, "In any grievance that involves an action taken by the commissioner or his designee concerning the preservation of the integrity of or the maintenance of the public confidence in the game of basketball and a fine or suspension that results in a financial impact to the player of more than 25,000, the grievance arbitrator shall apply an arbitrary and capricious standard of review."

This is confirmed by section 13, which says on the one

hand a fine or suspension imposed by the commissioner, imposed by the commissioner, shall be appealable to the grievance arbitrator only if it results in financial impact on the player more than 25,000.

So the first issue here is, is this something which is a fine or suspension by the commissioner that involves the preservation of the integrity of the maintenance of public confidence in the game of basketball, that it causes injury of more than $25,000? Then the agreement says that goes to the grievance arbitrator. That is one possible arbitration. That is a procedural decision to decide whether the prerequisites are met for that arbitrator or the other arbitrator.

THE COURT: But that is not the dispute.

MR. KESSLER: Right.

THE COURT: As you say, it is not a case of my listening to what the other side is characterizing. I have read the agreement. I don't think that you dispute that the commissioner has sole authority to discipline and review appeals of conduct on the playing court. Do you disagree or agree with that?

MR. KESSLER: I would change one word: To discipline and to serve as the arbitrator for appeal.

THE COURT: The sole arbitrator?

MR. KESSLER: The sole arbitrator. It is always only one. It is either the grievance arbitrator or him. It is one

arbitrator or the other.

My point is if you look at section 8, and that is why I wanted to compare it, it is an arbitration procedure when it goes to the commissioner. It talks about written decisions,

hearing dates, full and final binding disposition. This is exactly the situation we are picking between arbitrators.

The Bettman decision we cited is very much on point in this case. It was a decision rendered by Magistrate Dolinger that was affirmed by Judge Wood. In that case the NHL, very similar type system, has the commissioner, called the president there. The commissioner decides in final, binding ways disputes between players and clubs in certain defined categories of circumstances, including their team discipline, by the way.

Even though they didn't use the word he is an arbitrator, what the Southern District found is that he was serving as an arbitrator. And even though, by the way, he is not exactly neutral.

The issue there was that we argued he shouldn't be able to serve as the arbitrator. I represented the hockey players in that case. We argued he shouldn't be able to serve as an arbitrator because he was biased. The court said you bargained for a biased arbitrator, but he is the arbitrator. That is what happened in that case essentially, in the Bettman case.

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The point here is, and this is the only reason for this, the decision of which arbitrator, the commissioner or the grievance arbitrator, Arbitrator Kaplan found is a decision, a decision, that is procedural. It is not a question that this is going to a court. It is a question does it meet the requirements of the commissioner or does it meet theirs.

This is all in the arbitrator's decision, which again we believe should be in deferential review because it is procedural. The other part of the Supreme Court cases is that when it is a procedural arbitrability decision, it is

deferential review to the arbitrator, not de novo review. That is important.

THE COURT: It seems to me, in reviewing the decision and reviewing all the papers, that this is not a helpful analysis to proceed in this order. I am not interested right now in whether or not the arbitrator had the authority to determine whether it was substantive or procedural.

It seems to me that if I were to go straight to the heart of this issue, whether or not it is conduct that is solely within the purview of the commissioner or conduct that is an arbitrable issue as defined by the collective bargaining agreement, then that in and of itself determines the issue. It wouldn't depend on any analysis as to whether or not the arbitrator should have or shouldn't have determined whether it was procedural or substantive.

If it is determined that the collective bargaining agreement says that this issue falls within the language that this issue should go to the arbitrator, then the arbitrator did the right thing. If it says that this is an issue that falls within the language which says that it is exclusively the commissioner's decision, then the arbitrator did the wrong thing, and I don't have to first analyze whether it is substantive or procedural.

MR. KESSLER: I agree with you 100 percent with respect to the issue of whether the arbitrator has to have the authority to decide. You don't have to decide that for just the reasons you explained.

However, the issue of whether this jurisdictional issue is a procedural or substantive one has meaning for one additional reason that the Supreme Court said, which is that

whether he had the authority to do it or not, because he has done it, because he has done it, if it is procedural, you should look at what he has done with deference; if it is substantive, you should look it de novo. So there is a different layer of significance to that procedural/substantive distinction according to the Supreme Court.

THE COURT: The deference or de novo review goes to the substance of what the decision is. So the reality is practically -- and I don't know if the other side is arguing that, but I have yet to hear an argument that the union is

saying that if the arbitrator had the authority to decide this, we think that it was wrongly decided to the extent that a court can step in and overturn this decision. I haven't heard that argument yet. Maybe they do intend to make that argument -- it seems to me so far whether or not there is a de novo review or deference doesn't make a big difference here.

MR. KESSLER: The reason I don't think it makes a big difference is because I think we have likelihood of success under either standard. Maybe I should just go to the heart of it. Whether you conclude de novo or deference, I think you could come to the same conclusion, and the conclusion is the following.

In 1995 -- and the arbitrator went through this and we put this in independently through Mr. Klepman's affidavit -- a major change was made in the NBA. Prior to 1995 it said all arbitrable appeals went to the commissioner for discipline if it involved either conduct on the playing court or conduct for the integrity and preservation of confidence in the game, which is at Article XXXV(d) of the NBA constitution. That was the rule. So prior to 1995 it was the commissioner.

In 1995, as a huge concession in bargaining -- this

was a dramatic and major change -- all these changes took place which we detailed in our affidavit and submission. Those changes were designed to indicate that only for conduct on the playing court or for conduct of less than $25,000 impact on the

player, so two categories, only those two things would the arbitration just go to the commissioner. Otherwise, the grievance arbitrator is unequivocally given jurisdiction, he applies a just cause standard under section 14. Under section 5 he has standards. It couldn't be clearer that is the case.

What the issue becomes here is, is this an Article XXXV(d) integrity of the game suspension, number one? We believe, as the arbitrator found, it unequivocally is. But if there is any doubt, the commissioner wrote that it is. The discipline notices that were sent out to the players said Article XXXV(d) of the constitution of the NBA. Match that up with integrity and confidence of the game, that is what article XXXV(d) says. So they can't dispute it is an Article XXXV(d) and they don't dispute that.

What they do say is that even if it is Article XXXV(d) -- they don't dispute it is Article XXXV(d) -- and even though it is public confidence, they say they still should get out of it because it is conduct on the playing court.

We have two responses to that. One, if it is Article XXXV(d), it doesn't go out even if it is conduct in the playing court. But you don't have to reach that. That is one grounds. The reason for that is sections 5, 13, and 14(c) make it clear if it is Article XXXV(d), confidence of the game, there is grievance arbitrator jurisdiction.

As the Supreme Court has said repeatedly, if there is

any possibility that that is where it goes, that is where it goes. In other words, that is the standard you have to apply; whether it is deference or de novo, that is the standard you have to apply.

Second, I don't press that argument, because we win on conduct on the playing court. The issue of conduct on the playing court is best illustrated, if I may start, your Honor, with looking at what the district attorney did in this case. It has to do with the difference between the events that happened outside of the game.

I don't know how familiar your Honor is with the incident. But it is not the first part, when Mr. Wallace and the Pistons was pushing and shoving the players and they are milling around. In fact, it was quite violent, what he was doing. It is the separate set of events that occurred when the fan hits Mr. Artest with the cup and he runs into the stands and basically a riot breaks out in the stands and then onto the court and everything else.

That second set of conduct is not conduct on the playing court as those terms are understood and as the arbitrator found. That is not conduct within the confines of the game. It is not a hard foul. It is not a flagrant foul. It is not leaving the bench during a game. It is none of those things.

It is very much like what happened with Mr. Sprewell

and his coach, which went to the grievance arbitrator unopposed. That was on the playing court. It happened to be during practice, but it was on the playing court.

The whole point here is the distinction. The DA filed charges for conduct against players and fans there. The DA didn't file charges against Mr. Wallace. Why not? Because,

and this is well established and other people recognize, things that are happening in the game itself are things that traditionally fall within league jurisdiction: Pushing a referee in a game, things like that. We don't contest that. We didn't appeal any of those suspensions. So that is a distinction here.

THE COURT: The awkward part of that argument, the difficulty that I have just factually, as we just discussed, the issue is not the conduct of Johnson, Artest, or Jackson. All of those arguments have to do with their conduct. It is unclear to me in your papers whether or not you are talking about that Mr. O'Neal's conduct. And that is what is at issue, Mr. O'Neal's conduct.

MR. KESSLER: Yes.

THE COURT: Mr. O'Neal was not in the stands.

MR. KESSLER: Yes.

THE COURT: So the question is solely, as to O'Neal's suspension, whether Mr. O'Neal's conduct was on or off the court. What is your position?

MR. KESSLER: It was off the playing court. The reason for that is his conduct happened four or five minutes after. The arbitrator saw all this on the tape. The game had been brought to a complete halt. In fact, Mr. O'Neal wasn't even in the game at the time. He was on the bench.

Four or five minutes later, fans were running on the sides of the court in a riot situation, threatening one of the players, threatening one of the players, and Mr. O'Neal got into an altercation with that fan when he was trying to protect the player.

THE COURT: On the court?

MR. KESSLER: Not on the playing court. It was off on the side. The playing court concept, as the arbitrator found -- and this is why deference makes a point. He understands the agreement of the shop, the arbitrator here. What the "playing court" meant and has to mean is in the context of a game.

THE COURT: Wait a minute. I want to separate the two practical elements that you say constitute that definition. You are saying that it has to be on the court during the game.

MR. KESSLER: It has to be part of the game. It has to be in the flow of the game.

THE COURT: You are saying it has to be on the court during the flow of the game.

MR. KESSLER: That's right.

THE COURT: You do not dispute that his conduct was on the court?

MR. KESSLER: I do dispute that, your Honor.

THE COURT: You dispute that he was physically on the court when he struck this player?

MR. KESSLER: Yes. Actually, he was off the sidelines. He was off the court. In fact, your Honor, paragraph 19 of uniform playing contract is very important here, because I think your Honor is thinking of this as if different words were used. Let me point this out.

In paragraph of 9 of the uniform player contract, when the parties wanted to talk about behavior on the court, adjacent to the court, otherwise in the arena, they knew how to do so. This is on page A16 to A17 of the collective bargaining agreement, which is there. This was a release for fighting.

What it said here is that the player releases claims for fighting, and specifically under number 2, "any fighting or

other form of violent or unsportsmanlike conduct occurring during the course of any practice and/or any competition, regular season or playoff game, on or adjacent to the playing floor or in or adjacent to any facility used for practices or games."

In other words, when the parties wanted to talk about the sidelines, the stands, the fans, the entryways, other things that weren't there, they knew exactly what language to

use. The NBA and we drafted this language very carefully.

The playing concept, which goes back to the seventies at least in the CBA, was the concept of sports commissioner jurisdiction. This is what the arbitrator found and this is why it is important. He understand the law of the shop. He has been there for six years. He is the one who the courts look to on these issues. He said what this meant, what this concept meant, was a commissioner's jurisdiction for things like hard fouls, pushing a referee, a player going off --

THE COURT: I don't see that language in his opinion. I see the distinction he draws is in the stands or not in the stands. That is the only distinction. I see no finding by the arbitrator that Mr. O'Neal's conduct was not on the floor. And I have looked at it very, very carefully. He makes the distinction between those people, the conduct that occurred in the stands.

MR. KESSLER: He clearly found that he had jurisdiction over Mr. O'Neal's suspension, and he reduced it. He obviously found that it wasn't on the playing floor.

THE COURT: You say obvious. There is nothing obvious. The language is not there. It does not say that.

MR. KESSLER: Here it is.

THE COURT: Which page?

MR. KESSLER: Page 16.

THE COURT: Page 16. Just a second. All right.

MR. KESSLER: "The confrontation between players and fans, spectators, and even arena personnel is distinctly different from the on-court or in-the-game conduct such as flagrant fouls, fight between players, hard picks, elbows, and confronting referees. It is clear that the genesis of the confrontation occurred when a spectator threw a cup of liquid on Artest when he was lying on the table."

THE COURT: Right. He says Artest and Jackson entered the stands. He doesn't mention at all in that paragraph O'Neal. As a matter of fact, I can tell you exactly what he says with regard to O'Neal. On page 25 he says at the top, "O'Neal left the bench and attempted to enter the stands." He says in the next paragraph, "O'Neal was attempting to enter the stands."

He says in the paragraph where he has O'Neal's quotation, "O'Neal attempted to assist his teammate Johnson on the floor. He punched a spectator." And O'Neal is quoted as saying, "When you start to see fans come onto the court, let alone in the stands hitting players, when they come onto the court, then it becomes a scary situation."

Then the arbitrator says, "O'Neal did not enter the stands. He was trying to protect his teammate Johnson, who was on the floor with a broken hand during this confrontation."

Then, in the next-to-last paragraph before the conclusion, the sentence says, "The NBA cannot tolerate such

conduct. My decision is based on the totality of his actions, including his failure to enter the stands." There is no

language as to Mr. O'Neal that says his activity took place in the stands or his activities took place somewhere else other than on the floor.

You legitimately can argue that that doesn't necessarily mean that it happened on the playing court during the game, as you argue that that definition is to be interpreted and as you argue that that is the way the arbitrator interpreted it. But there is no finding here that Mr. O'Neal's activity did not take place on the court.

MR. KESSLER: Let me read to your Honor one thing on page 18. He says, "Based on the reasons set forth above, I find the suspension of Artest, Jackson, Johnson, and O'Neal were not for 'conduct on the playing court' as set forth in Article XXXI section 8." So he unequivocally made a finding as those terms are meant.

I would suggest to your Honor that what he did is he concluded that once the altercation began, the location -- actually, if you look at the videotape, your Honor, which we are happy to give you, where the altercation took place was actually off, behind the out-of-bounds line. But that shouldn't make a different.

THE COURT: Maybe I ought to look at it again. My recollection is when the punch was thrown, I'm not sure

that that is where Mr. O'Neal was located.

MR. KESSLER: Your Honor, let me give you an example which I think illustrates why the arbitrator is right about this. Let's say four hours before the game started a player was alone practicing on the court at the Conseco Arena and a fan, for some reason, got through security, ran out when a player is shooting by himself, and got into a fight with that

player. It was literally on the playing court, just like Mr. Sprewell's altercation with his coach was literally on the playing court. It happened to be during practice. It was on the playing court.

There is no way that that is what is meant by these terms and that the union gave up the right, because that altercation with the fan could have happened on the court physically, it could have happened in the hallways, it could have happened walking into the arena. So the parties would not --

THE COURT: The NBA is arguing that the game had not been called at that point. Is that a factual dispute? Are you claiming that there is evidence that the game had been called other than that there was a fight, there had been technicals called, that they tried to stop the fight? You are not saying that time had expired and the game was over, and you are not saying that officially by this time the referees had called this game? Are you saying that that is factually correct?

MR. KESSLER: I don't know that anybody knows when the game was called.

THE COURT: That is what I am trying to figure out.

MR. KESSLER: It never resumed.

THE COURT: You don't say that it was necessarily over, had been called?

MR. KESSLER: It doesn't matter to our argument. What I am saying, your Honor, is the following.

THE COURT: But it does matter to your argument. Is your argument that this fight had taken place and then order had been restored and then the technicals were shot and the last 45 seconds was played? Are you saying that if a fan had been on the court and had been punched by a player, that would

not fall within the definition that you have given me of what conduct on the court is supposed to be?

MR. KESSLER: That would not be on the playing court as I have given that to you, that's correct. The reason is what you have to do, your Honor, and frankly --

THE COURT: Because it is in the middle of a timeout, it is not on the playing court? I am not quite sure what definition you are using.

MR. KESSLER: Here is what I am saying, your Honor. This is why labor arbitrators get deference. This is not the tax code. These are vague terms that have been in the league for decades.

THE COURT: I am just trying to understand how you say those terms should be defined.

MR. KESSLER: What I am saying is that the term "on the playing court," the only way to make it make sense, particularly in light of the change in 1995 when the players got the right to arbitration, it can't turn upon, for example, whether the referee called the game five seconds before Mr. O'Neal got into the struggle with a fan or five seconds after. That would be completely arbitrary. That can't be the difference. It can't turn upon whether the fight started on this side of the end line and then they got pushed over the end line and then it becomes on the playing court. That would be an irrational agreement. The parties wouldn't make that agreement.

THE COURT: Isn't that what you are urging?

MR. KESSLER: No.

THE COURT: You are saying if it wasn't on the floor while they were playing basketball, shooting the ball, and the

clock was running, then it is not on the playing floor. Isn't that the fine distinction you are drawing?

MR. KESSLER: No. What I am arguing is it is the type of conduct, which the arbitrator well understood and the DA understood, that things that come out of the flow of the game --

THE COURT: The DA's determination is irrelevant.

MR. KESSLER: I would say, for example, any time a fan is involved, that is not what was contemplated here. This contemplated things involving two players, a player and a referee, the participants in the game. The reason the commissioner has this is he is protecting the rules of the game.

It is a very violent game. All sports are. He says deciding how much violence is allowed in the confines of the game, how much could you talk back to the referee, those things. That is what gets appealed to him. It is about the sport. Nothing about this riot is about the sport.

THE COURT: I want to make sure I understand your argument. You are arguing that even if this took place on the playing court during the game where a fan ran out on the court, tried to stop a player from making a shot, if that player pummeled that fan in the middle of the game, that is in the within the commissioner's jurisdiction?

MR. KESSLER: I think it would be an independent fact determination. It is possible that for the hypothetical you gave would be so -- the fan just runs out, gets the player while he is shooting, he is immediately escorted off, the game continues -- an arbitrator who understands the concepts that are applied in the first instance, which is why it is deferential, might determine that that does qualify as on the

playing court. Maybe it doesn't. You look at a lot of facts

to determine that issue.

THE COURT: When you said that it depends on whether it is a fan or a player, that is not the argument that you really mean to make?

MR. KESSLER: I am saying a fan makes it a very different situation. Whether that fact alone will control a hundred percent of the time, I don't ever want to give you a hypothetical, because there could be cases where it would.

THE COURT: But that is what you were saying to me.

MR. KESSLER: What I think is important here in this case is that there were two different events, very clear on the tape. There is the fight between Wallace and the other players which goes on for four minutes. Nothing is happening. Mr. O'Neal is on the bench. The game never resumes again from that time standpoint ever again. Four minutes, they all clear, it is not done.

Then an entirely different situation develops that at that point, as I said, could have happened outside of the arena, it could have happened in the stands, it could have happened on the sidelines: A riot breaks out. In those situations the union didn't bargain for the right that, for example -- let's say in Mr. Artest's case, for example, he has been suspended for life. They didn't bargain away the right that if it didn't have to do with something that directly involved the regulation of the game -- that is why they put in

only a $25,000 limit. What they wanted is fair process. This is about due process.

By the way, we lost on three of the suspensions. We

respect that. We are talking about the process, the fairness and integrity of the process that was agreed to in 1995. The only way you should interpret this with a deferential review is that the arbitrator was correct in understanding the meaning of this concept of on the playing court. That is the important thing.

It was not designed to be as rigid, because then you would be setting up a rule that would make no sense. As I said, if you go over the line one way or the other -- this particular one, if you look at the individual, I think when it started he was on the sidelines. Maybe he slid over, for all I know. That can't be the issue. The arbitrator didn't consider that the issue. He considered the issue that this was a riot. That had no context to the game. In that thing it is an integrity suspension.

This is a suspension under XXXV(d). Remember my first argument. We have unequivocal language that says if it is a suspension for integrity of the game, that is more than $25,000 in impact, it goes to the grievance arbitrator. That is the change. That is what this was designed to get at, these types of suspensions. If not these types, what type? It's got to be a Sprewell type and this type. There aren't that many where we

can do this.

I want to say something before I conclude on this, because I know that an Arbitrator Kaplan found that a riot broke out that had its genesis in the stands and spilled out onto the floor. That is what he found. It is a different event. The genesis is in the standards, spilled out onto the floor. That is why this wasn't the type of discipline that is exclusively --

THE COURT: Are you saying that the genesis of the

fight that makes it impossible to be an on-the-court incident after that?

MR. KESSLER: What I am saying is all of these facts which the arbitrator found, which he looked at, that he had knowledge of the shop, that he understood the way sports work, the way these things are interpreted, all of these facts together were taken into account in concluding this, and all you are looking at now, because of the balance of hardships, is whether we have substantial questions going to the merits of our position, combined with the presumption of arbitrability and deferential standard.

What I am saying here, there is more than enough for there to be substantial questions going to the merits, combined with the deferential standard, combined with the presumption of arbitrability and the balance of hardships tipping decidedly in our favor. The Supreme Court says if it is ambiguous, it is

arbitrable by him.

I do want to make two points that they made in their brief before I conclude, which I didn't address. One point is they cited a case called Katz v. Feinberg by the Second Circuit, which they say says that it is not procedural on that issue and no deference if it is between two arbitrators.

Your Honor, that is not what that case says. That is the case that they primarily rely upon. That was a case which had nothing to do with the procedural/substantive thing. It doesn't cite the Supreme Court authority. It doesn't even look at it.

The issue there was whether or not the arbitration clause covered at all or whether it was something that should go to an accountant who was not an arbitrator. That is how the

decision reads. It is fact-specific. I don't think it at all stands for any proportion in this.

Your Honor should just look at that, because it doesn't say quite what they say in the brief, and it doesn't discuss this issue of review of procedural versus substantive. It doesn't even cite the Supreme Court cases. There is just no discussion of it.

Second, they make the argument of what they call prior history of the parties, which you are going to hear about, which the arbitrator rejected. That is important to begin with. But let me say something about that. They cite a few

things as prior history, and I just want to respond why it is not prior history.

This is an issue, in effect, of first impression, which is what the arbitrator said. Their prior history was, one, Mr. Charles Barclay. That was before 1995. We had no right to appeal integrity of the game suspensions, completely different CBA. It could have no meaning in terms of that. So that is out of the box, doesn't apply.

The second one they cite is Judge Rakoff's TRO denial on likelihood of success. I said I would mention that. That ruling from the bench, your Honor, which I suspect we might get something like here, that ruling from the bench doesn't at all say what they say it says. We didn't argue on-the-court/off-the-court there. We didn't argue anything about this.

What we said is the NBA had a rule about leaving the bench, and we said they have no authority to issue the rule, it was collusion. There a collusion provision in the CBA. The judge said we have not established a likelihood of success that we would prevail that it was collusion for the NBA to have this rule passed. That is what the holding was on likelihood.

He simply notes that he particularly finds it shouldn't be eligible for collusion when there is this other provision about appealing suspensions. He mentions the section 8, and he accurately quotes section 8 about the commissioner's authority. There was no ruling about that section. No one

argued that section applied. That wasn't the issue. He just noted that section.

No one was arguing on or off the court. There, frankly, we would not argue off the court. What happened there is during the course of the game, players ran out into the court in the middle of a game as part of the game, and the referees had to get rid of them and restrain them. That is not an issue and he didn't rule upon it and it wasn't decided. So that precedent doesn't work.

Finally, everything else they cite in the Buchanan affidavit is, as the arbitrator found, we contest the jurisdiction. We said grievance, they said commissioner. That is Mr. Rodman's past discipline and Mr. Wallace's past discipline. That doesn't decide anything. Or they cite a variety of things which either were on the playing court, like someone leaving a bench during the course of the game, nothing to do with anything, it was normal thing. So we don't contest that. Or it was less than $25,000 injury, so there we have to go to the commissioner, because if they fine him $10,000 or something we don't have any right to go there.

They don't have any case where certainly the union was agreeing that something that we are saying here -- a fight with fans that happened in an altercation outside of the game, having nothing to do with the game -- there is nothing like that where the union has ever agreed to take a position.

This is an issue of first impression which the arbitrator correctly decided. All your decision is, on the TRO motion anyway, assuming we have shown balance of hardships tipping decidedly in our favor, is are there substantial questions sufficient to prevent this irreparable harm from happening, particularly because they won't suffer any irreparable harm the other way? Or, if you find the balance is more equal, have we shown a likelihood of success?

waiver, by the way, the law is crystal clear and unequivocal. They can't argue we have waived our rights or anything like that.

This is an unusual case. I suspect you may be on the bench a long time before you get a case quite like this again. But I would urge your Honor that this is a case where there is tremendous irreparable harm to the union and the player, and there is no harm to them at all because the player can be suspended later if we are wrong. If you balance of hardships our way, irreparable harm.

At the very least, the very least, there are substantial questions here, particularly in light of deference. We don't have to show we are certainly going to win. We only have to show either substantial questions or, at worst, likelihood. It is not that we are definitely going to win.

That is the whole purpose of interim release. They will get their chance later. If we turn out to be wrong, he

will serve the rest of his suspension, there will be no harm to them. But if we are right, and I think we have shown we are going to be right, we can never again make up this harm to the player or the union.

THE COURT: Thank you.

MR. KESSLER: Thank you, your Honor.

THE COURT: Let me give my court reporter a break for a second, Mr. Mishkin, and then we will continue with you. We will take five.

(Recess)

THE COURT: Mr. Mishkin.

MR. MISHKIN: Good morning, Judge Daniels. Not surprisingly, I don't agree with Mr. Kessler that this case is terribly complicated. The principal matter that you have to decide today, the likelihood of success matter, is whether or not the conduct of Mr. O'Neal took place on the playing court, as that phrase is used in section 8 of Article XXXI of the CBA.

Although I will try to be very brief in my oral argument, I do have a witness and we do have some video. I think we can quickly move through some of the things. In light of the arguments that Mr. Kessler made, we really ought to take a look at some of the video, and we will do that very quickly after I am done.

The first point I would like to make is because we are here on the type of injunction that is not usually asked for,

sometimes it is but it is being asked for here, and that is a mandatory injunction. The application to you is to alter the status quo. In this circuit, when you seek to reinstate an employee who has been suspended or discharged, that reinstatement is always viewed as changing the status quo.

It is a mandatory injunction, and there is an even higher standard that has to be met in order to get any sort of TRO or preliminary relief. We cite the cases that tell you that. So it isn't simply a matter of fair grounds for litigation. What Mr. Kessler is going to have to show here is

the clearest, clearest demonstration that he will win or is very likely to win on the question of whether or not Mr. O'Neal was off the court within the meaning of section 8. And even if he can show that, which I don't think for a minute he can show, he is going to have to show the kind of irreparable harm that is very palpable and immediate and obvious in its irreparableness.

On that point, let me quickly go to where Mr. Kessler started, and that is, is there irreparable harm here? He said we shouldn't look at this as a sports case, and I agree with him. We should look at it as a collective bargaining case, an employment case.

In the Second Circuit, an employee who has to serve a discharge or suspension while he is waiting for a decision on the merits has been found over and over again not to be

suffering irreparable harm. Back pay and other remedies can make an employee whole if it turns out that they have improperly served a suspension that was later overturned.

THE COURT: In your argument with regard to the harm you say will be done to the league, you put this in a different context than a factory worker who shows up to work and gets a paycheck.

MR. MISHKIN: We do, your Honor. Our players get paid a lot more.

THE COURT: And their showing up for work, as you said, or not showing up for work has a significantly greater effect on the league and on that player's status.

MR. MISHKIN: As it is supposed to. The reason for imposing suspensions when serious misconduct has occurred is because it is a serious matter to take a player off the court. But that doesn't mean that within the standards of a

preliminary injunction it is irreparable. It is certainly intended to be serious, but it is not irreparable. At least it is not irreparable in the NBA.

Other sports handle it differently. In baseball, your Honor may know that the practice is that the player who is suspended does not begin serving his suspension until there has been a final review as to whether or not he should serve it. The practice is completely opposite in the NBA.

If we can look at 14(d). I would like to put that up

on the screen. One historical fact, your Honor, and I will explain in a minute. In the history of the NBA, no NBA suspension for discipline has ever, ever been enjoined or stayed or made subject to a TRO. It has never happened.

THE COURT: We are in a situation that has never happened?

MR. MISHKIN: With respect to this, I think it is so. Mr. O'Neal was suspended a long time. 25 games puts him in the hit parade of top suspensions, that is true. But even Mr. Kaplan found that 15 of them, which have now been served, were not of any harm to him, that is what he deserved. We are only talking now about the remaining number of games. I think that that situation has occurred many, many times in the NBA, that some finite number of games has been served.

As 14(d) says, "Nothing contained herein shall excuse a player from prompt compliance with any discipline imposed upon him. If discipline imposed upon a player is determined to be improper by a final disposition under this Article XXXI, the player shall promptly be made whole."

Mr. Kessler says is that has nothing to do with irreparable harm. I think it has to do with irreparable harm.

It is a recognition in the collective agreement between us and the union that players can be made whole. That language, that phrasing, of course relates to preliminary injunction standards: Can you be made whole or not?

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If you can be made whole, then the injury you are suffering -- and of course you are suffering some injury. Again, that is the point of the suspension. But if you can be made whole for it, as we say you can, then that injury is not irreparable and certainly not of the type of irreparable harm that has to be shown on a mandatory injunction to alter the status quo and put someone back on the court, in particular the games we are talking about,

As your Honor may or may not know, the next game that Mr. O'Neal is being asked to play in is Christmas Day. It is a rematch, if I can use that word, between the Pacers and the Pistons. Part of the suspensions here clearly was to make sure that that date had come and gone before we were putting someone back.

THE COURT: I am not sure on what basis you make that argument. I don't see any place in this record where that was ever a consideration or a motivation for the number of suspensions or any individual suspension.

MR. MISHKIN: Your Honor, as you know, we have made no record. The minute that Mr. Kessler tried to bring this before the grievance arbitrator, we told them, and you will see all the correspondence, that we would not participate, that this arbitrator had no jurisdiction at all, this was all conduct on the playing court within the meaning of Article VIII. So we have yet to make any of our record.

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THE COURT: But there is nothing you have submitted in

the record before me for me to make a termination that the reason that this suspension was structured the way it was is so that the players could avoid the next Detroit game.

MR. MISHKIN: That is correct, your Honor. We have not put anything in the record. But I think that the fact that that is the game and the attention that is going to be paid to that game and the security that is going to be involved in that game at least is a factor.

THE COURT: I would assume that both the commission and the league, given what occurred in the last game, have taken what they believe will be appropriate steps to ensure that this kind of thing doesn't happen again, whether he is on the court or off the court.

MR. MISHKIN: I assure you they will try, and very hard.

THE COURT: I want to make sure I clearly understand your argument. Are you arguing that there is a likelihood of irreparable injury to the league because there is a greater chance that there is going to be further violence if he plays in this game?

MR. MISHKIN: Yes, I am, your Honor. That goes more to the balance of the hardships. I really focus now on the question of lack of irreparable harm, because we have agreed that it can be remediated by a back pay award.

The last thing I will say on this point is Dean Feerick, when he was the arbitrator, decided a case involving Isaiah Rider, this exact issue. An application was made to Dean Feerick to stay the suspension while he was deciding the merits of the dispute. It was before the arbitrator. This was not on-the-court conduct. Dean Feerick, said I cannot issue a

stay. A stay that is being requested of you here is unprecedented.

THE COURT: All of those other circumstances were circumstances that were while the arbitrator was considering the issue. They were not circumstances in which the arbitrator had already decided the issue. So the argument is a little different.

Their argument is that, look, this is not the same. The plaintiffs in this case may be absolutely right if we were asking for a stay or asking for any kind of injunctive relief while the arbitrator was making its decision, but the arbitrator has made his decision. They are saying, look, we have a decision, and what is going to happen is either the court is going to uphold that decision or the court is going to set aside that decision.

The presumption is that the court is going to uphold an arbitrator's decision unless there is some evidence to believe that there has been some other determination, so the posture of the case is significantly different from all of the

other situations we have addressed in the past.

MR. MISHKIN: Of course you are right, your Honor. But what makes it different is that the NBA has asserted that there was no jurisdiction. In every other one of those arbitrations, we recognized and participated in those arbitrations.

This is the first one where we have said this obviously does not go to the arbitrator, it goes to the commissioner, we are going to treat it as a nullity and we are not going to participate. So for us there is yet to be a determination as to whether we are right that this matter should not have been heard by the arbitrator. We say it is not

arbitrable.

I don't think that that distinction really undermines very much the history that there has never been, while a merits issue was still to be resolved, an NBA player put back on the court before serving the suspension that the commissioner had imposed on him. It just has never happened. Again, I think it just goes to irreparable harm.

THE COURT: You say that the player could be made whole.

MR. MISHKIN: Yes.

THE COURT: I assume that your argument is no more or no less than if he has to sit out 10 more games and it is determined that he shouldn't have sat out those 10 games, that

we will just pay him for it. Is there any other argument that you are making that he can be made whole in any other way?

MR. MISHKIN: Yes. Dean Feerick went into several. He said of course the basic point is to make him whole, to pay him, but with a public statement that he was not --

THE COURT: Give him a nice letter saying we're sorry? How is that going to make him whole?

MR. MISHKIN: This isn't me. This is Dean Feerick.

THE COURT: I am asking you. I know Dean Feerick.

MR. MISHKIN: Judge, I don't want to quibble about it. Of course money is the principal way that you make someone whole.

THE COURT: I am just trying to understand what other way you are saying he could be made whole.

MR. MISHKIN: It may not be perfect, but if it is a way of substantially making somebody whole -- again, you will, I am sure, read the employment cases that we cite. Back pay

has been found over and over again -- in this circuit it is pretty close to a rigid rule that there is no irreparable harm. You do not grant mandatory injunctions putting people back to work where they can get back pay. That is what I want to say right now on irreparable harm.

THE COURT: At this point I am not making a judgment about it. I am just trying to figure out whether you are arguing that if the player has to sit out 10 games that it is

determined that he should not have sat out.

MR. MISHKIN: Yes.

THE COURT: You are not making any other argument to me at this point that the league intends to make him whole other than paying him for those games?

MR. MISHKIN: There isn't much the league itself can do to make him whole beyond being paid for those games.

THE COURT: So there is nothing else that I should consider with regard to whether or not that is going to be adequate to make him whole if he has to sit out 10 games that he should not have sat out?

MR. MISHKIN: I think, your Honor, you should consider that there is only a monetary remedy. But I think you should also consider paragraph 14(d) in which the parties agreed a player could be made whole. They didn't just say and we will pay him. The parties went further, which is why that 14(d) is very much an indication of how the parties view irreparable harm. It is reinforcing to the NBA anyway -- other sports are different -- that you serve your suspension in the NBA, and then if it is wrong, you get back pay. That is how you are made whole.

That was a deliberate choice of words. That is how we want it in the NBA, and that is how it has always been. I

understand the differences in this case. But the fact remains that were an injunction to issue ordering a player back on the court where there were still 10 days left in the commissioner's suspension, that would be the first time in the history of the NBA that had ever happened.

THE COURT: As we all understand, this is a very unique circumstance, because that language was in contemplation that that would be the case until an ultimate decision was made either by the arbitrator or the commissioner with regard to whether or not the discipline or action was appropriate.

MR. MISHKIN: Or a court, if there is a dispute about whether the arbitrator had jurisdiction.

THE COURT: That may apply to that. I am not sure that is what the parties had in mind, that we would end up in this circumstance, when they wrote that article.

MR. MISHKIN: No, we did not have the Detroit incident in mind when we wrote those words. But we did write "determined to be improper." We didn't confine it to the commissioner or an arbitrator.

Cases can come up in different ways. This case has come up in its own way. But there has not yet been a final determination. So this would be, again, the first time that has ever happened. For all these reasons, Judge, I don't think they can make out the kind of irreparable harm you have to make out on a mandatory injunction.

THE COURT: Let's talk briefly about the balance of hardships. In this case you have made several arguments in your papers and here today with regard to the effect of having him serve this 10-game suspension until this dispute is